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ELECTION COMMISSION, INDIA

NOTIFICATION

*New Delhi, the 23rd November 1957/2nd Agrahayana, 1879 Saka*

S.R.O. 3774.—Whereas the election of Shri Rajbhoj Pandurang Nathaji, as a member of the Council of States by the elected members of Bombay Legislative Assembly has been called in question by an election petition presented under Part VI of the Representation of the People Act, 1951, (43 of 1951) by Shri Shridhar Madhadeo Joshi, resident of 199/4, Tilak Wadi, Sadashiv Peth, Poona No. 2;

And whereas the election tribunal appointed by the Election Commission in pursuance of the provisions of section 86 of the said Act for the trial of the said petition has, in pursuance of the provisions contained in section 103 of the said Act, sent a copy of its order in the said election petition;

Now, therefore, in pursuance of the provisions of section 106 of the said Act, the Election Commission hereby publishes the said order of the Tribunal.

IN THE COURT OF THE ELECTION TRIBUNAL AND DISTRICT  
JUDGE, POONA

Ex. 14.

ELECTION PETITION No. C. S. (1)478 OF 1957.

Shri Gokhale, Shri Mohan Dharia and Shridhar Madhadeo Joshi, age about, 50, residing at 199/4 Tilak Wadi, Sadashiv Peth, Poona-2.—*Petitioner.*

*Vs.*

Shri S. V. Gadgil and Rajbhoj Pandurang Nathoji, 207 Ghorpade Peth, Poona City.—*Respondent.*

## JUDGMENT

This is a petition for a declaration that the election of the respondent to the Council of State is illegal and void.

2. The material facts briefly stand as follows:—

Dr. B. R. Ambedkar, who was elected to the Council of States by the elected members of the Bombay Legislative Assembly, died some time in December 1956. Dr. Ambedkar died before the expiration of the term of his office. The vacancy of the seat held by him was declared by the Election Commission by a Notification No. 100/2/31/57 published in the Bombay Government Gazette dated 11th of April 1957 under the provisions of Section 147 of the Representation of the People Act, 1951. The Notification called upon the elected members of the Legislative Assembly of the State of Bombay to elect, in accordance with the provisions of the Representation of the People Act and of the Rules and Orders made thereunder, a person to fill the vacancy so caused before the 4th May, 1957. The Notification is published on page 1123 of the Bombay Government Gazette Part IV-C. Three more vacancies were declared to have occurred in the seats of the Council of States from the State of Bombay in the same Gazette at pages 1120, 1121 and 1122. These three vacancies occurred on account of the election of the three members to the House of the People. The dates for making nominations, scrutiny of nominations, withdrawal of candidatures and of poll also were declared in the same Gazette in respect of the aforesaid four vacancies. In respect of two vacancies *viz.*, those of Shri M. M. Shah and Shri Jaisukh Lal Hathi, the following dates were prescribed:—

16th April 1957—the last date for making nominations.

18th April 1957—the date for the scrutiny of nominations.

22nd April 1957—the last date for the withdrawal of candidatures.

29th April 1957—the date on which a poll shall, if necessary, be taken.

4th May 1957—the date before which the election shall be completed.

The time of the poll, however, in respect of each of the above elections were separately specified. In respect of the election to the seats held by Shri R. B. Raut and Dr. B. R. Ambedkar the following dates were prescribed:—

16th April 1957—the last date for making nominations.

18th April 1957—the date for the scrutiny of nominations.

22nd April 1957—the last date for the withdrawal of candidatures.

30th April 1957—the date on which a poll shall, if necessary, be taken.

4th May 1957—the date before which the election shall be completed.

The time for taking the poll in respect of each of the above elections, however, was separately specified.

3. The old Bombay Legislative Assembly was dissolved on 4th April 1957. The elections to the new Bombay Legislative Assembly were held in the month of March 1957 and the results of the elections were declared on 5th April 1957. The names of the elected members were published in the Bombay Government Gazette Part IV-C dated 11th April 1957 on pages 1109 to 1118.

4. The respondent P. N. Rajbhoj was the only candidate who filled in his nomination paper for the vacancy caused by the death of Dr. B. R. Ambedkar. Similarly Sonusing Dhansing Patil was the only person who put in his nomination for the vacancy caused in the seat held by Mr. R. B. Raut; Mr. Maganlal Bhagwanji Joshi for the vacancy in the seat of Mr. Jaisukh Lal Hathi and Mr. Jethalal Harikrishna Joshi for the vacancy in the seat of Mr. M. M. Shah. Since no other nominations were made, the results of the election of the respondent and the other persons mentioned above was declared on the 22nd of April 1957 and the said result was published in the Bombay Government Gazette on the 5th of May 1957. In the present petition the election of Mr. P. N. Rajbhoj alone is called in question and he is the only person who has been added as respondent in the petition.

5. The Petitioner alleges as follows:—

The petitioner was elected from Shukrawar Peth constituency of the City of Poona as a member of the Bombay Legislative Assembly in the general elections held in March 1957. He was also a member of the old Bombay Legislative Assembly which was dissolved on the 4th of April 1957. The petitioner was entitled to vote as a member of the Bombay Legislative Assembly for electing the representatives of the State of Bombay to the Council of States. The petitioner submits the following among other grounds in support of his petition:—

- (1) At the time when the election of the respondent was declared or at the time when the Election Commission called upon the elected members of the Bombay Legislative Assembly to elect the representatives of the Bombay State to the Council of States, there was in law no electoral college in existence.
- (2) Without prejudice to the above contention and even if it be held that there was electoral college in existence, the election of the respondent is void, because the election of the four vacancies referred to above was held on two different days and on every day, at a different time for each vacancy.
- (3) The publication of the Notification by the Election Commission calling upon the electors to elect representatives of the Bombay State to the Council of States, was not in accordance with law.

6. The petitioner points out that the first meeting of the new Legislative Assembly of the Bombay State was convened on 17th June 1957. That being the case, the members who were elected, had not made and subscribed before the Governor or some person appointed by him in that behalf an oath or affirmation according to the form set out for the purpose in the 3rd Schedule of the Constitution as required by Article 188 of the Constitution. The petitioner argues that every member of the Legislative Assembly of a State is required, before taking his seat, to make and subscribe before the Governor or some person appointed by him in that behalf an oath or affirmation according to the form set out for the purpose in the 3rd Schedule of the Constitution; if a person sits or votes as a member of the Legislative Assembly or the Legislative Council of a State, before he has complied with the requirements of Article 188, he shall be liable in respect of each day on which he so sits or votes, to a penalty of Rs. 500 to be recovered as debt due to the State. That being the case, no elected member of the Legislative Assembly can vote or exercise any privilege or right or power by virtue of his being a member of the Legislative Assembly unless he has made and subscribed an oath or affirmation according to the form set out in the 3rd Schedule of the Constitution as laid down by Article 188 of the Constitution of India.

7. The petitioner relies upon Article 80 (4) of the Constitution and points out that the representatives of each State in the Council of States shall be elected by the members of the Legislative Assembly in accordance with the system of proportional representation by means of a single transferable vote. When the Election Commission published the Notifications there were four representatives to be elected from the Bombay State to the Council of States inasmuch as four casual vacancies had accumulated. It was, therefore, incumbent upon the Election Commission to hold election to the four vacancies on the same day and at the same time in order that the mandatory provisions of Article 80 of the Constitution may be given effect to. By holding elections on two different dates and at different times on the same day the system of proportional representation by means of a single transferable vote for the election of the four representatives of the State of Bombay to the Council of States, was not given effect to. This has caused serious prejudice to many an elector and to many an intending candidate inasmuch as the minority groups in the Bombay Legislative Assembly belonging to different political parties, such as, the Praja Socialist Party (of which the petitioner is a leading member), the Communist Party, the Peasants and Workers Party and similar other parties and the Independents elected under the auspices of the Samyukta Maharashtra Samitee and the Maha Gujarath Janata Parishad, could not think of making nominations because the possibility of their candidates being elected was nil, as the election was held on the basis of a single majority vote.

8. The Petitioner alleges that the Notification of the Election Commission calling upon the elected members of the Bombay Legislative Assembly to elect representatives to the Council of State was issued only in the Bombay Government Gazette Part IV—C on the 6th of April 1957. The enlarged Bombay State comprises far-flung areas, such as Cutch, Saurashtra, Gujarath, Maharashtra including Marathwada and Vidarbha. In order to enable the electors or the intending candidates to take advantage of the elections by nominating their own candidates, it was just and proper that publication of the said Notification should have been by insertion of the said Notification in different language newspapers belonging to these different areas. This was particularly necessary at the time when the Assembly was not in session. The period mentioned in the Gazette of 6th April 1957, viz. 6th April 1957 to 16th April 1957, which was the last date for making nominations was grossly inadequate in view of the distant and scattered areas to which the electors belonged. On account of the inadequate publication of the said Notification, the result of the election of the respondent has been materially affected. It has further been materially affected by the non-compliance with the provisions of the Constitution and of the Representation of the People Act, 1951 and the Rules and Orders made thereunder as stated above.

9. The petitioner, therefore, prays that the election of the respondent be declared void and that the respondent be directed to pay to the petitioner the costs of the petition.

10. The respondent appeared and put in his written statement at Ex.11. The contentions raised by him may be summarised as follows:—

- (1) There is no provision for constituting Electoral College for the purpose of the election in question. No Electoral College was necessary for the election of the respondent. The Petitioner's contention is misconceived and untenable.
- (2) As far as the respondent was concerned, he was a candidate only for the vacancy caused by the death of Dr. B. R. Ambedkar. The reference to the election of the four vacancies is irrelevant for the purpose of inquiry with regard to the respondent's election.

- (3) The publication of the Notification calling upon the elected members of the Bombay Legislative Assembly to elect representatives to the Council of States was proper and in accordance with law.
  - (4) The persons who are declared as elected to the Bombay Legislative Assembly are entitled to elect their representatives to the Council of States on behalf of the Bombay State. The petitioner's contention regarding the necessity of such elected members taking or subscribing an oath or affirmation is incorrect.
  - (5) As there was only one nomination paper submitted for each of the four vacancies, there was no occasion or necessity to take a poll. Had the election been contested by reason of more than one nominations having been filed for the same vacancy, then only it would have been necessary to take a poll. The respondent, therefore, alternatively contends that the necessity of elected members taking or subscribing an oath or affirmation in order to be entitled or qualified to vote would have arisen only if poll was actually required to be taken. In the peculiar circumstances of this case, the result would have been the same even if the date of taking the poll had been fixed after the elected members had taken or subscribed an oath or affirmation.
  - (6) The contentions based upon Article 80 of the Constitution are untenable and are based on wrong interpretation of that Article.
  - (7) The publication of the notice regarding the elections was made also in newspapers.
11. The following issues were framed at Ex. 13:—
- (1) Is the existence of the electoral college of the Bombay Legislative Assembly necessary for holding elections to the Council of States?
  - (2) If so, does the petitioner prove that there was no electoral college of the Bombay Legislative Assembly for electing representatives of the Bombay State to the Council of States at the time when the election of the respondent was declared?
  - (3) Does he further prove that the newly elected members of the Bombay Legislative Assembly were not entitled to cast their votes by reason of the fact that they had not yet made or subscribed an oath or affirmation according to the form set out for the purpose in the 3rd Schedule of the Constitution?
  - (4) Does the election of the respondent become invalid by reason of the above-mentioned disability?
  - (5) Does the petitioner prove that it was incumbent upon the Election Commission to hold election to the four vacancies on the same day and at the same time so as to comply with the provisions of Article 80 of the Constitution of India?
  - (6) Does he further prove that the period of 10 days given by the Notification published in the Bombay Govt. Gazette of 6th April 1957 was inadequate to enable intending candidates to make their nominations?
  - (7) Has the result of the election of the respondent been materially affected by the non-compliance with any of the provisions of the Constitution of India and/or the Representation of the People Act, 1951, and/or the Rules and Orders made thereunder?
  - (8) To what relief is the petitioner entitled?

### 12. My findings are:—

1—No. 2—Does not arise. 3—The elected members of the assembly are entitled to vote before making and subscribing an oath or affirmation. 4—No. 5—It was not incumbent. 6—No. 7—No. 8—The petition must be dismissed.

13. It was alleged in the petition that there was no electoral college available for the purpose of the election by the Bombay Legislative Assembly of representatives of Bombay State to the Council of States and that there was a vacuum in so far as the existence of electoral college for the said purpose is concerned. There is no basis for this contention either in the provisions of the Constitution or the Representation of the People Act. Nowhere has the expression 'Electoral College' been used in its relation to electing members to the Council of States by the elected members of the Legislative Assembly. As a matter of fact, the Bombay Legislative Assembly as such does not form the constituency or electoral college for electing representatives to the Council of States. It is only a particular class of members of the Bombay Legislative Assembly who are entitled to vote in such election and they are the elected members of the Bombay Legislative Assembly of the State. This is clear from the provisions of Article 80(4) of the Constitution of India. It is to be remembered that the Bombay Legislative Assembly comprises not merely elected members but also includes nominated members. Article 333 of the Constitution of India provides that if the Governor of a State is of opinion that the Anglo-Indian community needs representation in the Legislative Assembly of the State and is not adequately represented therein, he may nominate such number of members of the community to the Assembly as he consider appropriate. Page 1118 of the Bombay Govt. Gazette dated April 11, 1957 Part IV—C, contains the name of the nominated member Shri Norman R. Ferguson at No. 393 and also a notification to that effect. Article 170 of the Constitution, which relates to the composition of the Legislative Assemblies, provides that the assembly shall consist of certain number of members chosen by direct election from territorial constituencies in the State subject to the provisions of Article 333. The nominated member of members have not been conferred a right to vote in choosing the representative of the State to the Council of States. That being the case, there is no electoral college as such for electing representatives of the State to the Council of States. Mr. Gokhale Advocate fairly conceded this position and explained that the use of the expression in the petition 'Electoral College' is terminological inaccuracy.

14. The main argument advanced by Mr. Gokhale was based on the provisions of Article 188 of the Constitution of India. Article 188 provides that every member of the Legislative Assembly or the Legislative Council of a State shall, before taking his seat, make and subscribe before the Governor, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule. Mr. Gokhale contended that the expression 'before taking his seat' is synonymous with assuming duties as a member. In other words, he argued that a member, though elected to the Legislative Assembly, does not become a full-fledged member, in the sense of being able to participate in any work to be performed by him under law as such member before making and subscribing an oath or affirmation according to the form. In order to reinforce his argument in this respect he referred me to the form of oath contained in the Third Schedule. The form is in the following terms:—

"I, A. B., having been elected (or nominated) a member of the Legislative Assembly (or Legislative Council), do swear in the name of God  
solemnly affirm

that I will bear true faith and allegiance to the Constitution of India as by law established and that I will faithfully discharge the duty upon which I am about to enter."

Mr. Gokhale emphasised the word's 'about to enter' and contended that this shows that an elected member cannot enter upon his duties without first making and subscribing an oath or affirmation. Mr. Gokhale then referred to Article 193 of the Constitution which provides for certain penalty for sitting and voting before making oath or affirmation under Article 188. The Article provides (relevant part quoted): "If a person sits or votes as a member of the Legislative Assembly or the Legislative Council of a State before he has complied with the requirements of Article 188—he shall be liable in respect of each day on which he so sits or votes to a penalty of five hundred rupees to be recovered as a debt due to the State." Mr. Gokhale argued that this section prohibits the physical act of sitting by an elected member who has not made and subscribed an oath or affirmation on the floor of the assembly. He contended that in that case there was no necessity of issuing a specific prohibition against voting by such members; and inasmuch as the Constituent Assembly has made a specific provision prohibiting voting, the Constituent Assembly must have in its mind the voting by the members not on the floor of the assembly but even outside. He pointed out that the word 'votes' has not qualified by the words 'in the assembly or the Council as the case may be'. Mr. Gokhale also argued that inasmuch as penalties have been provided against sitting on the floor of the assembly or voting before making oath or affirmation it follows that such an act or acts have been rendered illegal and also have been prohibited. In order to be able to—evaluate the soundness of the above arguments it is necessary to take into account two points and they are:

(1) When shall the Assembly be deemed to have been constituted. (2) Whether the making and subscribing of the oath or affirmation is a condition precedent to clothe the elected member with his rights as such elected member. The answer to the first point is provided by the provisions of Section 73 of the Representation of the People Act, which, in effect, lays down that after the general elections are held, there shall be notified in the Official Gazette, the names of the members elected in the various constituencies together with the names of persons, if any, nominated and upon the issue of such notification that House or Assembly shall be deemed to be duly constituted. Mr. Gokhale suggested that if this provision is intended to over-ride the provisions of Article 188, then it would be *ultra vires* the House of Parliament. He, however, strenuously argued that this provision is not intended to over-ride the provisions of Article 188, because all that it provides is that the Assembly shall be deemed to be duly constituted as soon as the names of the elected members have been duly notified in the Official Gazette. He argued that it is not enough that the Assembly is duly constituted. It is further necessary that each of the members is legally competent to enter upon the discharge of the duties enjoined upon him under the Constitution and this he cannot do before making and subscribing an oath or affirmation. In other words, the whole argument of Mr. Gokhale revolves round the question of the proper interpretation of Article 188 of the Constitution of India. In interpreting Article 188 of the Constitution it is necessary to refer to the context in which that provision has been made. The head note under which Articles 188 and 189 are grouped is 'Conduct of Business'. That means that these provisions have relation to conduct of business. It is true that the head note does not control the actual words of the Section or the Article. At the same time it will give us a clue to the understanding of the mind of the Legislature. It is further necessary to underline the expression 'before taking his seat'. Mr. Gokhale wanted to interpret that expression to mean 'before

assuming his membership.' This interpretation contradicts the opening words of the Article, viz., 'every member of the Legislative Assembly'. The taking of the seat by a person pre-supposes that he is a member of the Legislative Assembly and he becomes a member as soon as the Assembly is constituted under the provisions of Section 73 of the Representation of the people Act. That means that by the expression 'taking his seat' is meant the physical act of occupying his seat and participating in the transaction of the business of the house. In other words, if a member wants to take a seat on the floor of the Assembly and participate in the deliberations it is necessary that he makes and subscribes an oath or affirmation. If a member chooses not to take his seat and participate in the proceedings of the Assembly, there is nothing in the Constitution to suggest that he ceases to be a member of the Legislative Assembly. Of course, he will not be able to take his seat or participate in the deliberations. But that has nothing to do with his qualification as a member of the Assembly. If we read Article 193 in the above light we will find that Articles 188 and 193 are consistent with one another and can be reconciled with one another. If a member chooses to sit in the Assembly before making or subscribing an oath or affirmation, he will have to pay the penalty laid down in the Article. If his taking the seat in the Assembly has gone unnoticed and if he further participates in the deliberations and takes part in the voting on a particular proposition, then again for such an act he will have to pay the penalty laid down in the Article. But if the member is prepared to incur the penalty laid down in Article 193, there is nothing in the Article to suggest that his taking the seat or his participating in the deliberations is in any way illegal. The Speaker of the Assembly, of course, has very wide powers and he may prevent the member from either taking his seat or taking part in the deliberations. In other words, the enforcement of the penalty clause rests with the Speaker and in the last analysis in the Assembly. That itself shows that the acts against which the provisions are aimed are acts which are intended to be committed and can be committed on the floor of the Assembly and not outside. Although, therefore, the word 'votes' has not been qualified by such words as 'in the Assembly or the Council', yet in the context it means 'votes in the Assembly or the Council as the case may be'. This has no reference to the exercise of a vote for electing a representative which is vested in a member in his capacity as an elected member. In this connection it is interesting to consider the provision of Article 190 of the Constitution which relates to vacation of seats. That Article makes a distinction between a vacancy which occurs in an automatic manner by the provisions of law and vacancies which occur by reason of the happening of certain supervening events. Clause (1) lays down that no person shall be a member of both Houses of the Legislature of a State and provision shall be made by the Legislature of the State by law for the vacation by a person who is chosen a member of both Houses of his seat in one House or the other. Section 69(1) of the Representation of the People Act lays down that if a person who is already a member of the House of the People and has taken his seat in such House is chosen a member of the Council of States, his seat in the House of the People shall, on the date on which he is so chosen, become vacant. Sub-section (2) makes the same position applicable to the case of a member of the Council of States being chosen as a member of the House of the People. Clause (2) of Article 190 provides that no person shall be a member of the Legislatures of two or more States and if a person is chosen a member of the Legislatures of two or more such States, then, at the expiration of such period as may be specified in rules made by the President, that person's seat in the—Legislatures of all such States shall become vacant, unless he has previously resigned his seat in the Legislatures of all but one of the States. Clause (3) relates to disqualification incurred under Clause (1) of Article 191 and resignation given by a member.



Clause (4) is the most relevant Clause for the question under our consideration. It lays down: "If for a period of sixty days a member of a House of the Legislature of a State is without permission of the House absent from all meetings thereof, *the House may declare his seat vacant.*" Then there is a proviso relating to the computation of the period of 60 days and it says that in such computation the time during which the House is prorogued or adjourned for more than four consecutive days shall not be taken into account. The important point to be noted is that the mere absence for a period of 60 days by an elected member does not entail vacancy of his seat. It is further necessary that the House may make a declaration that his seat has become vacant by reason of his continuous absence for a period of 60 days. There is no provision which says that a person who has not made and subscribed an oath or affirmation as laid down by Article 188 shall either cease to be a member of the Assembly or that his seat will become vacant. The only provision which would apply to his case will be Clause (4) of Article 190 which requires absence of 60 days, to entail the consequence of his seat falling vacant upon the House making such a declaration. This suggests that an elected member continues to be a member of the Legislature although he has not made and subscribed an oath or affirmation until the house intervenes in the matter and makes a declaration that his seat has become vacant by reason of his continuous absence for 60 days. There is no such thing as automatic vacancy in the case of a person who has not made and subscribed an oath or affirmation.

15. The argument advanced by Mr. Gokhale does not appear sound even on general principles. There is bound to be a period of interregnum between the constitution of the House and the first meeting of the Legislature when an oath or affirmation can be made and subscribed. If Mr. Gokhale's argument is sound, then it will come to this that although the members have been duly elected and the House has been constituted, yet the members can not perform any act as such members. It is significant to note that Article 80 of the Constitution, which confers the right to the elected members of the Legislative Assembly to choose their representatives to the Council of States, precedes Article 188. In fact it precedes Chapter III which relates to the State Legislature. The right to choose representatives to the Council of States is a fundamental right vested in the elected members as such elected members by Clause (4) of Article 80 of the Constitution. The exercise of that right in no way depends upon making and subscribing an oath or affirmation under Article 188 of the Constitution. If Mr. Gokhale's argument is accepted, then it will mean that the elections to the Council of States will have to be postponed till Assembly meets and the members have the opportunity of making and subscribing oath or affirmation under Article 188. After all, the voting does not take place on the floor of the House. It has no relation whatsoever to the conduct of the business of that House. There is, therefore, no reason why such elections should be postponed till the House is convened and opportunity is given to the members to take their seats on the floor of that House. In my opinion, therefore, the taking of oath is not a condition precedent for enabling an elected member to take part in the election to the Council of States. A member does not cease to be a member if the oath is not taken; nor does failure to make oath render his seat vacant *ipso facto*. I am, therefore, unable to accept the argument that the Election Commission contravened the provisions of the Constitution in fixing a date, before the first day of the meeting of the Assembly for taking oath, in the matter of election to the seat vacated by the demise of Dr. B. R. Ambedkar, or for the matter of that to the three other seats which became vacant for reasons set out above.

16. As a matter of fact, no polling took place in the present case and it was unnecessary to do so. There was no rival candidate in the field and the

only nomination submitted was that of the respondent. So far as the submission of the nomination papers are concerned, that is in no way dependent and need not await the Constitution of the House, much less upon its first meeting. Nomination can be made by any person and the members of the Assembly do not play any part in the same. There was, therefore, nothing wrong on the part of the Commission in fixing the 16th of April, 1957 as the last date for making the nominations. As there was no rival candidate in the field, the respondent was declared duly elected on 22nd April, 1957, that is to say, before the date of the polling. The question of exercising the right of vote did not, therefore, arise at all. If that is so, the question as to whether the elected members can or cannot exercise the right of vote before they have had opportunity of making and subscribing an oath or affirmation assumes academic significance so far as the facts of this case are concerned.

17. The second point urged against the election of the respondent was that although four vacancies had accumulated, the Election Commission did not call upon the members of the Assembly to elect representatives to all the four vacancies at a time. Each vacancy was treated as a separate vacancy and election was announced to take place not only on different dates but at different times on the same day. It was argued by Mr. Gokhale that this procedure contravenes the principle of proportional representation laid down in Clause (4) of Article 80 of the Constitution. Clause (4) lays down that the representatives of each State in the Council of States shall be elected by the elected members of the Legislative Assembly of the State in accordance with the system of proportional representation by means of the single transferable vote. The system of proportional representation appears to have been adopted in the case of elections to the Council of States by the members of the Legislative Assembly with a view to ensure the election of all the political parties in the Assembly in accordance with their strength in that House. In other words, the object is to ensure representation of the minority parties. Mr. Gokhale pointed out that the vacancy caused by the death of Dr. Ambedkar was a vacancy in respect of a seat reserved for the Scheduled Caste. He, therefore, argued that it was but meet and proper that this vacancy should go to a minority party. This last argument is an argument based on political considerations and has no basis in law. It is evident that the provisions of Clause (4) of Article 80 will come into operation when there are, as a matter of fact, more than one vacancies to be filled at a time. If there is only one vacancy to be filled, the system of proportional representation by means of a single transferable vote does not come into the picture at all. Mr. Gokhale pointed out that although Dr. Ambedkar died in December 1956, his vacancy remained to be filled for some months and it so happened that all the four vacancies were notified on the same day and in the same Gazette; whatever the reasons, the fact remains that four vacancies remained to be filled at the time when the necessary Notifications were issued in the Government Gazette; here was, therefore, a splendid opportunity for implementing the procedure laid down in Clause (4) of Article 80 of the Constitution of India. Unfortunately this opportunity was not availed of and each vacancy was treated as a separate vacancy to be filled by an independent election. In the petition it was suggested that this action was inspired by *mala-fide* and ulterior motives of defeating the right of electing members to the Council of States on the basis of proportional representation by means of a single transferable vote. In the course of his argument, however, Mr. Gokhale gave up this contention and restricted himself to the legal side of the matter, and contended that whatever the motives, the way in which the election has been conducted has caused serious prejudice to many an elector and to many an intending candidate. It was stated in the petition that it was because of this that the minority groups in the Bombay Legislative Assembly belonging to different political parties, etc., could not even think of

making nominations because they felt that the prospect of their candidates being elected was nil. In testing the validity of this argument it is necessary to refer to the two provisions of the Representation of the People Act, 1951. Section 12 which falls within Part III, relating to Notification of General Elections, lays down that for the purpose of filling the seats of members of the Council of States retiring on the expiration of their term of office the President shall, by one or more notifications published in the Gazette of India on such date or dates as may be recommended by the Election Commission, call upon the elected members of the Legislative Assembly of each State concerned to elect members in accordance with the provisions of this Act and of the rules and orders made thereunder. Section 147 which falls within Part IX headed 'Bye-Elections' relates to casual vacancies in the Council of States. It lays down: "When before the expiration of the term of office of a member elected to the Council of States, his seat becomes vacant or is declared vacant or his election to the Council of States is declared void, the Election Commission shall by a notification, etc., call upon the elected members of the Legislative Assembly to elect a person for the purpose of filling the vacancy so caused before such date as may be specified, etc., etc.....". It will thus be seen that a distinction has been made between vacancies caused by the retirement of a certain member or members on the expiration of term of office and vacancies caused by the seat becoming vacant or being declared vacant before the expiration of the term of office of a member for certain reasons. For filling vacancies in the former case general elections will be held and for filling vacancies in the latter case bye-elections will be held. The four vacancies in the present case are casual vacancies arising under Section 147 of the Representation of the People Act. It appears to me that the provisions of Clause (4) of Article 80 of the Constitution relating to the system of proportional representation can be adopted only in respect of general elections and not in respect of bye-elections. The casual vacancies must be treated as individual vacancies to be filled separately. In view of these provisions in the Representation of the People Act, the Election Commission can hardly be blamed for not treating the elections to the four vacancies as general elections but as 'bye-elections' arising out of casual vacancies. As stated above, in my opinion, the provisions of Clause (4) of Article 80 are intended to be applied in the case of general elections. It is clear that they cannot be applied in the case of bye-elections occurring on account of casual vacancies. The mere fact that at one time more than one casual vacancies have occurred does not make any difference to the principle of the case and cannot, therefore, convert what is in essence a bye-election into a general election.

18. Mr. Gokhale argued that the notification was not published according to the provisions of the Representation of the People Act, nor was the publication adequate in the circumstances of the case. Mr. Gokhale relied upon Section 31 of the Representation of the People Act and contended that in addition to a notification under Section 30 it is incumbent upon the Returning Officer to issue a notice of the intended election in such form and manner as may be prescribed, inviting nominations of candidates for such election and specifying the place at which the nomination papers are to be delivered. The form of the notice is contained in Schedule I under Rule 3. It is form No. 1. Mr. Gokhale stated that as far as he was aware such notices were not published in the language papers in the prescribed form as laid down by Rule 3 of the Conduct of Elections and Election Petitions. The Petitioner has not made any affidavit in support of these allegations. Mr. Gadgil produced a copy of the issue of *Sunday Standard*, dated 7th April 1957 which contains a notice of the present election in the prescribed form. Mr. Gokhale also contended that although the notification was dated 6th April 1957 it came to be published in the *Gazette* of the 11th and the last date for making nominations was 16th April 1957. The period between the publica-

tion of the *Gazette* and the last date for the making of the nomination is 5 days and according to Mr. Gokhale such a period is obviously insufficient. He pointed out that the Bombay State is now a big State with far-flung regions and it is impossible to expect that intending candidates would become aware of the election in such short notice. There is some substance in this argument and it is impossible to hold that the time given for making the nominations was not quite adequate. But it is to be remembered that the petitioner has come forward with a specific case as to why no nomination papers were submitted by any person on behalf of the minority parties. It is not his case that no nominations were submitted on behalf of these parties because they had no notice of the election but because the prospect of their candidates being elected was nil as the election was to be held on the basis of a single majority vote. In other words, the petitioner's case is that the nomination papers were not submitted on behalf of the minority parties because they knew that they had no chance of victory and that also according to them the elections that were announced to take place before the oath was made was invalid. In that view of the case, it is not necessary to pursue the matter any further, nor has any material been placed before the Court in that respect.

19. The last point to be considered is that under Section 100 (1) (d) (iv) of the Representation of the People Act no election can be set aside unless the Tribunal is of opinion that the result of the election, in so far as it concerns a returned candidate, has been materially affected by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act. As pointed out above, the only nomination paper submitted was that of the respondent. There was, therefore, no occasion for any election taking place. According to the allegations made by the petitioner himself, the minority political parties did not think it worth-while to submit nomination papers because they knew that the elections would be void and also because they felt that they had no chance of victory. That means that in not submitting the nomination papers the minority parties took the calculated risk. In that case, can it be argued that the result of the election, in so far as the respondent was concerned, has been materially affected by their deliberate failure in submitting the nomination papers—a failure which appears to be the result of cool and calculated deliberations? I am, therefore, inclined to think that the petitioner has failed to prove that the result of the election has been materially affected so far as the respondent is concerned.

20. The result is that the petition fails. I, however, think that the proper order to be passed in regard to the question of costs is that the parties should bear their respective costs.

#### ORDER

The petition is dismissed. Parties to bear their respective costs.

*The 4th October 1957.*

(Sd.) V. A. NAIK,  
Election Tribunal and  
District Judge, Poona.

[No. 82/C.S. (1)/478/57.]

By Order,

A. KRISHNASWAMY AIYANGAR, Secy.

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*ERRATUM*

The issue No. of the Gazette of India Extraordinary, Part II—Sec. 3, dated the 11th October 1957 containing S.R.O. Nos. 3273, 3274 of the Ministry of Finance (Department of Revenue) (Page Nos. 2455–2456), should be “476” instead of “476-A”.

